Supreme Court, U.S.
FILED
JUL 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1979.

No. 79-1557

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

JOHN KEVIN HURLEY,
Respondent.

Brief in Opposition of Petition for a Writ of Certiorari to the Supreme Judicial Court

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Commonwealth of Massachusetts

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The Respondent, John Kevin Hurley, respectfully prays that the Supreme Judicial Court decline to issue a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts entered in the case of Commonwealth v. John Kevin Hurley.

(a) Opinion Below.

(b) Jurisdiction.

(c) Constitution Provisions.

The Defendant, John Kevin Hurley, is satisfied with the presentation of Opinion, Jurisdiction and Constitutional Provisions made by the Petitioner as in accordance with Rule 40 (3.) of the Supreme Court Rules.

(d) Questions Presented.

(1) Has the state court decided a federal question of substance not heretobefore determined by this court?

(2) Has the state court decided a federal question of substance in a way probably not in accord with applicable decisions of this court?

(3) Should this court prohibit the state from requiring that less evidence of conflict be shown by a defendant who alleges his counsel labored under conflicting interest, than that evidence required by the Federal Courts?

(e) Statement of the Case.[1]

The Defendant, John Kevin Hurley, was represented during the trial of this case by Attorney Henry Quarles, Jr. of Boston, Massachusetts. Quarles was court-appointed counsel. At the time of his appointment,

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[1] The respondent restates the case pursuant to S.J.C. Rule 40(3) principally because of the frequent references by the Petitioner to the findings of fact and order of Superior Court on Motion for New Trial (Petition A. 21a-28a). Respondent points out for the Court that the Motion was heard anew by the Mass. S.J.C. pursuant to the prevailing Massachusetts law stated in Commonwealth v. Ella Mae Ellison at 379 N.E. 2nd 560, 568 (1978):

> "As the present defendant never had the benefit of a trial judge's consideration of her new trial request, we are in a position to make, and are bound to make, the same scrutiny of the trial record as the Judge made or should have made, who passed on the New Trial Motion and we are to apply that more liberal standard or attitude which is considered appropriate when the illness or death of a trial judge has made it necessary for the Motion to be passed second hand. 'This Court, in passing upon the questions presented for review, may consider

Mr. Quarles was attorney in fact for one Robert Andrews (NT 18).[2] Quarles was privately retained as counsel for Andrews both before, during and after his representation of the Defendant, John Kevin Hurley (NT 18-21). Quarles was also a personal friend of Andrews.[3]

Attorney Quarles was aware that his former and in fact present client, Robert Andrews, a witness for the Commonwealth was at the time of the Defendant's trial in fear of being charged as an accessory after the fact for the crime. (NT 30). At the time of the trial, Mr. Andrews and Attorney Quarles had discussions concerning his possible involvement and the possibilities of his being charged as an accessory (NT 30).

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the fact that the Judge who heard the motions had before him nothing but the stenographic report of the evidence of the trial.'"

Commonwealth v. Gedzium,
261 Mass. 299, 304, (1927). Accord
Commonwealth v. Richardson.
1 Mass. APP CT. 348 (1973)"

The findings of Judge Beaudreau were found to have been in error and should not be cited as the present facts of this case.

[2]Reference (NT) is to transcript of Hurley's Motion for New Trial 2 held on July 19, 1978.

[3]Q. (By Mr. O'Neill) "What was your relationship with Mr. Andrews?"

A. "I was his attorney, as well as the fact that he was a personal friend of mine." (NT 6)

The Defendant, Hurley, was not present during any of these discussions between Andrews and his attorney, Quarles, and Attorney Quarles never informed the Defendant that there might be any problems or conflicts (NT 28). Both the trial judge and Assistant District Attorney O'Neill trying the case for the Commonwealth were aware that Attorney Quarles was representing Mr. Andrews (NT 23 and TR 515)[4]. Quarles spent considerable court time during the trial of the case representing the interests of witness Robert Andrews, conducting negotiations on and off the record with Assistant District Attorney O'Neill and with the Trial Judge McLaughlin during the course of the trial. (TR 18-21, NT 35-42 and NT 26). Trial Judge McLaughlin, while aware of the "dual representation", failed to make any inquiry of the Defendant concerning the possibilities of conflict (NT 32). A Motion for New Trial was filed and heard by Judge Robert Beaudreau, Judge McLaughlin having retired.

(g) Argument.

In Glazer v. U.S., 315 U.S. 60 (1942); Holloway v. Arkansas, 435 U.S. 475 (1978) and more recently Cuyler v. Sullivan, 100 S. Ct. 1708 (1980), this Court has repeatedly

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[4]Reference TR is to Trial Transcript

affirmed that:

> "A Defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief". Cuyler v. Sullivan at 1717.

The Hurley case presents actual conflict. His attorney representing the Defendant and a witness called by the Commonwealth to testify against him.

The Petitioner has always pointed to the testimony of Andrews and argued that it "bolstered the defense of Hurley". (Petition 4). Overlooked is the fact that Andrews was called by the Commonwealth to prove that the Defendant fled to Carver from the scene of the crime, consciousness of guilt. The Trial Court, at a discussion at the bench during Andrews' testimony, told defense counsel:

> "if they leave in a van at two or three o'clock in the morning to go to Carver, I think they have got some explaining to do. Otherwise, there will be a charge on consciousness of guilt." (TR 513-514)

and in fact charged the jury:

> "The law says that, when a person has fled from the scene of a crime...the jury can infer that the attempt to hide his connection by flight or otherwise was consciousness of guilt and may be considered by a jury along with other evidence to be sufficient to establish guilt." (TR 871)

Hurley was further prejudiced by the preoccupation of his attorney with protecting Andrews. Andrews was

being investigated by the Commonwealth as a potential Defendant in this matter. (NT 34 and NT 35).

Prejudice is shown in the actual trial record when Hurley's attorney, at a pre-trial hearing on Motions, attempted to get the Court to limit the questioning of Andrews by the Commonwealth (TR 19 and TR 21), and alludes to previous off-the-record negotiations with the District Attorney,

> "that being so, I asked the District Attorney to devulge to me what he intended to question the witness about, and, if the witness was desirous of answering those questions, then we could eliminate any Fifth Amendmert problems". (TR 19).

Att. Quarles, at the Motion for New Trial, testifies:

> "I can't recall, Mr. Mycock, whether it was on the record or not. But I know I was instrumental in having him here so that he wouldn't have to be served a summons." (NT 26)

Contrary to the opinions expressed in the petition for certiorari, the ruling by the Massachusetts Supreme Judicial Court in the instant case was in conformity with Holloway and now Sullivan.

Representing both a Commonwealth's witness and the Defendant has far more potential for conflict than multiple representation. Given the relationship between the State on one hand and the Defendant on the other, any assistance given by defense counsel to the Commonwealth is inconsistent with representing the Defendant.

To indulge in niceties as to whether defense counsel spent five minutes, five hours or five days helping Andrews is to do a disservice to the Defendant who on hindsight must prove conflict from the record of his trial; there is no record of Quarles' efforts for Andrews. We can only speculate as to whether Quarles was inhibited in cross-examination of Andrews, or other witnesses who might have implicated Andrews.

Although the Respondent does not believe that the State Court's decision is in any way in disaccord with the decisions of this Court, he feels it pertinent to raise the question of State's rights to demand more responsible conduct by defense attorneys who practice before its courts.

The State Court has labeled the error in this case as error of counsel rather than judicial error (Petition A.6a,7a).

The Supreme Judicial Court Rules of the Commonwealth of Massachusetts provide in part that:

> "Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants, or one of several persons under investigation by

> law enforcement authorities for the same transaction or series of transactions, including any investigation by a grand jury, except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. In some instances, as defined in General Rule 3:22 of this court, accepting or continuing employment by more than one defendant in the same criminal case will constitute unprofessional conduct." (S.J.C. Rule 3:22A, DF 6)[5]

Attorney Quarles failed to even notify Hurley that a conflict existed or might exist. (NT 28).

The State's expansion of the Sixth and Fourteenth Amendments protection of the Defendant's right to counsel can be compared with this Court's recent decision of Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035 (1980), wherein this Court held that the State of California might have a more liberal standard towards a person's First Amendment rights to free speech in its constitution or statutes than those rights which would be guaranteed under the United States Constitution.

(h) Conclusion.

While the actual conflict demonstrated in this case should not require Hurley to prove prejudice.

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[5]Underlining supplied for emphasis

Clearly Quarles' defense was influenced to a perceptible degree by his relationship both professional and as a friend of witness and suspect Andrews. The State Court in finding "genuine conflict" saw fit to reverse without determining prejudice. While I personally would love the opportunity to argue this case before the Supreme Court, the State's decision is neither contrary to the applicable decisions of this Court nor does it present a question of substance not theretobefore determined by this Court.

Respectfully submitted,

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